Supreme Court, U.S.
FILED
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No. 02-958

In The
Supreme Court of the United States

MUNIR M. UWAYDAH, M.D.,

Petitioner,

v.

VAN WERT COUNTY HOSPITAL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals properly dismiss Petitioner's interlocutory appeal because it was filed more than thirty (30) days after the order appealed from is entered?

PARTIES TO THE PROCEEDING

In addition to the parties named by Petitioner, Mark Minick, Chief Executive Officer of Respondent Van Wert County Hospital, is a Defendant in the underlying action.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner completely misstates the nature of this case. The District Court accurately summarized the nature of this case in its Order, which is attached as Appendix B to the Petition for Writ of Certiorari. In summary, Petitioner instituted this action, which arises from a contract between Petitioner and Respondents, on October 13, 2000 and filed an Amended Complaint on July 31, 2001. It was not until March 30, 2002 that Petitioner first raised the issue of arbitration.

B. Course of Proceedings and Disposition in the Courts Below

On March 30, 2002, almost 1½ years after Petitioner instituted this action, Petitioner filed a Motion to Stay the Proceedings and Compel Arbitration. This Motion was filed fifteen days before the cut-off date for discovery for summary judgment motions and a month prior to the cut-off date to file summary judgment motions.

On April 29, 2002, a telephone pretrial conference was held with the Court and all counsel. At that time, the Court declined to rule on Petitioner's Motion to Compel Arbitration. On May 1, 2002, Respondents filed a Motion for Summary Judgment on Petitioner's Complaint and Respondents' Counterclaim. On May 9, 2002, Petitioner filed a Notice of Interlocutory Appeal and Request to Stay Proceedings with the District Court. In the Notice, Petitioner stated it was appealing " . . . the action by the District Court in the captioned matter on April 29, 2002

refusing to issue an Order compelling or denying arbitration in favor of litigation and refusing to issue a Stay." (Respondents' Appendix 1)

On or about May 20, 2002, another telephone hearing was held by the Court with all counsel. The Court noted that it was divested of all jurisdiction due to the filing of the Notice of Appeal. The Court suggested to Petitioner's counsel that Petitioner might withdraw his Notice of Appeal and the Court would issue a written decision on Petitioner's Motion to Compel Arbitration. On or about May 24, 2002, Petitioner voluntarily dismissed its appeal without prejudice. (Petition, Appendix C)

The District Court issued its written decision on June 24, 2002 denying Petitioner's Motion to Compel Arbitration. (Petition, Appendix B) No appeal was taken by Petitioner until August 19, 2002, 56 days after entry of the Order denying Petitioner's Motion to Compel Arbitration. On September 17, 2002, the Sixth Circuit Court of Appeals issued an Order noting the appeal was untimely and granting Petitioner 21 days to provide the reasons why the appeal should not be dismissed. Petitioner filed a letter on October 2, 2002 setting forth his reasons. (Petition, Appendix D) The Sixth Circuit dismissed the appeal as untimely on November 7, 2002. (Petition, Appendix A)

REASON FOR DENYING THE WRIT

The only issue presented in Petitioner's Writ is whether the Sixth Circuit Court of Appeals properly

dismissed Petitioner's Notice of Appeal as untimely.[1] The decision of the Sixth Circuit Court of Appeals denying the appeal as untimely is mandated by Federal Rules of Appellate Procedure ("F.R.A.P."), Rule 4(a)(1)(A)[2] and 28 U.S.C. §2107(a).[3] The timely filing of a notice of appeal is mandatory and jurisdictional, and compliance is of the utmost importance. *Torres v. Oakland Scavenger Co.*, 486 U.S. 312, 315, 108 S.Ct. 2405, 2408, 101 L.Ed. 2d 285, 290 (1988). As Petitioner concedes, the Federal Arbitration Act, 9 U.S.C. §16, has no separate provision concerning time limitations for filing an appeal of an order denying a motion to compel arbitration and, accordingly, the rules set forth in F.R.A.P., Rule 4 and 28 U.S.C. §2107 govern.

Petitioner also notes that there are two exceptions to the 30-day rule set forth in F.R.A.P., Rule 4 and 28 U.S.C. §2107. However, Petitioner does not meet the criteria for either exception.

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[1] Petitioner makes various arguments concerning arbitrability, the Federal Arbitration Act, and waiver of arbitration. However, none of these issues are properly before the Court since the Sixth Circuit Court of Appeals did not rule on them.

[2] Federal Rules of Appellate Procedure 4(a)(1)(A) provides:

> In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the District Clerk within 30 days after the judgment or order appealed from is entered.

[3] 28 U.S.C. §2107(a) provides:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit, or proceeding of a civil nature before a Court of Appeals for review unless notice of appeal is filed, within 30 days after entry of such judgment, order, or decree.

First, the District Court can extend the time for filing a Notice of Appeal upon a motion filed not later than 30 days after the expiration of the appeal time and upon a showing of excusable neglect or good cause. F.R.A.P., Rule 4(a)(5)(A); 28 U.S.C. §2107(c). However, Petitioner did not file such a Motion with the Court within 30 days after the expiration of the appeal time nor make any showing of excusable neglect or good cause.

The second exception allows for reopening the time to file an appeal when a party did not receive notice of the entry of judgment or order within 21 days after entry. F.R.A.P. Rule 4(a)(6); 28 U.S.C. §2107(c). Petitioner received notice of the June 24, 2002 Order and, therefore, this exception is also inapplicable.

Finally, Petitioner makes a "relation back" argument claiming that the delinquent August 19, 2002 appeal should relate back to Petitioner's May 9, 2002 appeal of the Court's non-decision. However, Petitioner voluntarily withdrew the first appeal of the Court's non-decision. It is nonsensical to argue that the August 19, 2002 appeal relates back to a prior dismissed appeal. Petitioner concedes that the withdrawal of the first appeal " . . . was meant to allow a limited period within which the District Court could enter a written decision and then the matter would be re-appealed." (Petition, p. 8). However, Petitioner failed to appeal the District Court's written Order within the time mandated by F.R.A.P., Rule 4 and 28 U.S.C. §2107.

CONCLUSION

Petitioner's request to rewrite the rules of appellate procedure has no basis in statute, rule or law. Respondent Van Wert County Hospital requests that Petitioner Munir Uwaydah's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Mark J. Minick

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MUNIR M. UWAYDAH, Plaintiff, v. VAN WERT COUNTY HOSPITAL, *et al.* Defendant.	CASE NO. USDC #3:00CV7640 JUDGE JAMES G. CARR

NOTICE OF INTERLOCUTORY APPEAL AND REQUEST TO STAY PROCEEDINGS

Notice is hereby given that Plaintiff, Dr. Munir Uwaydah, appeals to the United States Court of Appeals for the Sixth Circuit pursuant to 9 U.S.C. § 16 from the action by the District Court in the captioned matter on April 29, 2002 refusing to issue an Order compelling or denying arbitration in favor of litigation and refusing to issue a Stay. Plaintiff further gives notice of a request to Stay Proceeding pending appeal pursuant to 9 U.S.C. § 3 and 16 and Fed. R. App. 8(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2002 a copy of the foregoing Notice of Appeal was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Michael P. Harvey
Michael P. Harvey, Esq.